

**MISSISSIPPI COMMISSION ON ENVIRONMENTAL QUALITY
REGULATION MCEQ-3:
REGULATIONS REGARDING ADMINISTRATIVE PROCEDURES PURSUANT
TO THE MISSISSIPPI ADMINISTRATIVE PROCEDURES ACT**

Adopted: November 17, 2005

I. METHOD OF OPERATION

- 1. Scope.** Part I of these Rules is promulgated pursuant to Miss. Code Ann. § 25-43-2.104 (Rev. 2003).
- 2. Description of Mississippi Commission on Environmental Quality and Mississippi Department of Environmental Quality.** Reference is made to Miss. Code Ann. §§ 49-2-1, *et seq.*, and 49-17-1, *et seq.* (Rev. 2003), which create and set forth the duties and responsibilities of the Mississippi Commission on Environmental Quality ("Commission") and the Mississippi Department of Environmental Quality ("Department"). The Commission is empowered to formulate environmental policy, adopt and enforce rules and regulations, receive funding, conduct studies for using the State's resources, and discharge duties, responsibilities and powers as necessary. The seven members are appointed by the governor. The Department serves as staff for the Commission. The Department staff is comprised of four (4) divisions: the Office of Administrative Services, the Office of Geology and Energy Resources, the Office of Land and Water Resources, and the Office of Pollution Control. The Executive Director of the Department serves as the Executive Director of the Commission.

II. ORAL PROCEEDINGS ON PROPOSED RULES

- 1. Scope.** Part II of these Rules is promulgated pursuant to the Mississippi Administrative Procedures Act, Miss. Code Ann. § 25-43-3.104(2)(d) (Rev. 2003), and applies to all oral proceedings held for the purpose of providing the public with an opportunity to make oral presentations concerning proposed new rules and/or amendments to rules or repeal of rules before the Commission under Miss. Code Ann. § 25-43-3.104 (Rev. 2003) and Miss. Code Ann. § 49-17-25 (Rev. 2003).
- 2. When Oral Proceedings Will Be Scheduled on Proposed Rules.** Prior to the adoption, amendment, or repeal of rules and regulations administered by the Department, the Commission shall conduct a public hearing after public notice. Such notice shall be given by publication once a week for three (3) successive weeks in a newspaper having a general circulation throughout the state. The notice shall contain a description of the proposed regulation and the time, date, and place of the hearing.
- 3. Notification of Oral Proceeding for Proposed Rule-Making.** The date, time, and place of all oral proceedings for proposed rule-making shall be filed with the Office of the Secretary of State and, within three (3) days of such filing, mailed to anyone who

makes a timely request. The oral proceedings shall be scheduled no earlier than twenty (20) days from the filing of this information with the Office of the Secretary of State. For at least twenty-five (25) days from the filing with the Office of the Secretary of State of the notice of proposed rule adoption, the Commission shall afford persons the opportunity to submit, in writing, argument, data, and any views on the proposed rule.

4. Presiding Officer. The Executive Director of the Department, or his designee who is familiar with the substance of the proposed rule, shall preside at the oral proceeding on a proposed rule.

5. Public Presentations and Participation for Proposed Rule-Making.

(a) At an oral proceeding on a proposed rule, persons may make oral statements and may make documentary and physical submissions, which may include views, comments, or arguments concerning the proposed rule.

(b) The presiding officer may place time limitations on individual oral presentations when necessary to assure the orderly and expeditious conduct of the oral proceeding. To encourage joint oral presentations and to avoid repetition, additional time may be provided for persons whose presentations represent the views of other individuals as well as their own.

(c) Persons making oral presentations are discouraged from restating matters that already have been submitted in writing.

(d) There shall be no interruption of a participant who has been given the floor by the presiding officer, except that the presiding officer may, in his or her discretion, interrupt or end the participant's time for presentation where the orderly conduct of the proceeding so requires.

6. Conduct of Oral Proceeding for Proposed Rule-Making.

(a) Presiding officer. The presiding officer shall have authority to conduct the proceeding for proposed rule-making in his or her discretion for its orderly conduct. The presiding officer may (i) call the proceeding to order; (ii) allow for a brief synopsis of the proposed rule and a statement of the statutory authority for the proposed rule; (iii) call on those individuals who desire to speak for or against the proposed rule; (iv) allow for additional statements following all participants' comments; and (v) adjourn the proceeding.

(b) Questions. Where time permits and to facilitate the exchange of information, the presiding officer may open the floor to questions or general discussion concerning the proposed rule. The presiding officer in his or her discretion may question participants and/or permit the questioning of participants by other participants about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants; however, no participant shall be required to answer any question.

(c) **Physical and Documentary Submissions.** Submissions presented by participants in an oral proceeding with regard to proposed rule-making shall be submitted to the presiding officer. Such submissions become the property of the Commission and are subject to the Commission's public records request procedures.

(d) **Recording.** The Commission or Department may record oral proceedings for the purpose of rule-making by stenographic or electronic means, at its discretion.

III. DECLARATORY OPINIONS

1. **Scope.** Part III of these Rules is promulgated pursuant to Miss. Code Ann. § 25-43-2.103(2) of the Mississippi Administrative Procedures Act, and is intended to set forth the Commission's procedures regarding requests for declaratory opinions as required by that statute. These rules are intended to supplement and to be read in conjunction with the provisions of the Mississippi Administrative Procedures Act, which may contain additional information regarding the issuance of declaratory opinions. In the event of any conflict between these Rules and the Mississippi Administrative Procedures Act, the latter shall govern.

2. **Persons Who May Request Declaratory Opinions.** Any person with a substantial interest in the subject matter may request a declaratory opinion from the Commission by following the specified procedures. "Substantial interest in the subject matter" means: an individual, business group, or other entity that is directly affected by the Commission's administration of a statute, rule, or order within its primary jurisdiction.

3. **Subjects Which May Be Addressed In Declaratory Opinions.** The Department on behalf of the Commission will issue declaratory opinions regarding the applicability to specified facts of: (a) a statute administered or enforceable by the Commission, (b) a rule promulgated by the Commission, or (c) an order issued by the Commission. The Commission will not issue a declaratory opinion regarding a statute, rule, or order which is outside the primary jurisdiction of the agency. "Primary jurisdiction of the agency" means the agency has a constitutional or statutory grant of authority in the subject matter at issue.

4. **Circumstances In Which Declaratory Opinions Will Not Be Issued.** The Department on behalf of the Commission may, for good cause, refuse to issue a declaratory opinion. The circumstances in which declaratory opinions will not be issued include, but are not necessarily limited to:

(a) lack of clarity concerning the question presented or situations in which the facts presented in the request are not sufficient to answer the question presented;

(b) pending or anticipated litigation, administrative action, or other adjudication or decision making which either may answer the question presented by the request or otherwise make an answer unnecessary;

(c) requests that fail to contain information required by these rules or in which the requestor failed to follow the procedures set forth in these rules;

(d) issues which have become moot, or are abstract or hypothetical such that the requestor is not substantially affected by the application of the statute or rule;

(e) issues in which no present controversy exists, meaning that the requestor is not faced with existing facts or those certain to arise which raise a question concerning the application of the statute or rule;

(f) questions concerning the legal validity of a statute or rule;

(g) requests not based upon facts calculated to aid in the planning of future conduct, but rather, adjudication of the correctness of past conduct or efforts to establish the effect of that conduct;

(h) questions involving the application of a criminal statute or sets of facts that may constitute a crime;

(i) questions the answer to which would require disclosure of information which is privileged or otherwise protected from disclosure by law;

(j) questions that are known to be currently the subject of an Attorney General's opinion request or which already have been answered by an Attorney General's opinion;

(k) questions on which a similar request is pending before the Commission, or concerning which a proceeding is known to be pending on the same subject matter before any agency, administrative or judicial tribunal;

(l) questions where issuance of a declaratory opinion may adversely affect the interests of the State, the Commission, or any of their officers or employees in any litigation pending or which reasonably may be expected to arise;

(m) questions that involve eligibility for a license, permit, certificate, or other approval by the Commission or some other agency, where there is a statutory or regulatory application process by which eligibility for said license, permit, certificate, or other approval would be determined; or

(n) requests not directed to the Executive Director of the Department.

5. Where to Send Requests. All requests for declaratory opinions from the Commission must be in writing and mailed, e-mailed, delivered, or transmitted via

facsimile specifically to the Executive Director of the Department. The facsimile telephone number for the Department may be found at its website, <http://www.deq.state.ms.us>. No oral or telephone requests or requests for declaratory opinions will be accepted. Requests not directed to the Executive Director of the Department shall not be considered as requests for declaratory opinions under these rules, and a response to such requests shall not be provided.

6. Name, Address, and Signature of Requestor. Each request must include the full name, telephone number, and mailing address of the requestor. All requests shall be signed by the person filing the request, who shall attest that the request complies with the requirements set forth in these rules, including but not limited to, a full, complete, and accurate statement of relevant facts. Such request shall also include the statement that, to the best of the requestor's knowledge, no related proceedings are pending before any other administrative or judicial tribunal. A request must be limited to a single transaction or occurrence.

7. Question Presented. Each request shall contain the following:

(a) a clear and concise statement of all facts concerning which the opinion is requested, limited to a single transaction or occurrence;

(b) a citation to the statute or regulation or rule at issue;

(c) the question(s) sought to be answered in the opinion, stated clearly and concisely;

(d) the identity of all other, known persons involved in or impacted by the described facts, including their relationship to the facts, their names, mailing addresses and telephone numbers; and

(e) a statement to show that the person seeking the opinion has a substantial interest in the subject matter.

8. Time for Commission's Response. Within forty-five (45) days after the receipt of a request which complies with the requirements of these rules, the Department on behalf of the Commission shall:

(a) issue a written declaratory opinion regarding the specified statute, rule, or order, as applied to the particular circumstances described in the request;

(b) decline to issue a declaratory opinion, stating the reasons therefore; OR

(c) agree to issue a declaratory opinion by a specified date, which shall be not later than ninety (90) days after receipt of the written request.

The forty-five (45) day period for response shall begin running on the State of Mississippi business day on which the request is received by the Executive Director of the Department on behalf of the Commission. A copy of the written declaratory opinion shall be mailed promptly to the requestor. The Department reserves the right to present the declaratory opinion to the Commission for final consideration.

9. Notice By Commission to Third Parties. The Department on behalf of the Commission or the may, at its discretion, provide notice to any person, agency, or entity that a declaratory opinion has been requested, and it may receive or consider data, facts, arguments, and/or opinions from other persons, agencies, or other entities other than the requestor.

10. Public Availability of Requests and Declaratory Opinions. Declaratory opinions and requests for declaratory opinions shall be available for public inspection and copying in accordance with the Public Records Act and the Commission's regulations concerning public records requests, known as MCEQ-2. All declaratory opinions and requests shall be indexed by name and subject. Declaratory opinions and requests may be held confidential by the Commission within the provisions of MCEQ-2 regarding confidentiality of records or if the information is exempt from disclosure under the Mississippi Public Records Act or other laws of the State, including but not limited to Miss. Code Ann. §§ 17-17-27(6) and 49-17-39 (Rev. 2003).

11. Effect of Declaratory Opinions. The Commission will not pursue any civil or criminal action against a person who is issued a declaratory opinion from the Executive Director of the Department on behalf of the Commission and who, in good faith, follows the direction given in the opinion and acts in accordance therewith unless a court of competent jurisdiction holds that the opinion is manifestly wrong and without any substantial support. Any declaratory opinion rendered by the Executive Director on behalf of the Commission or shall be binding only on the Department and the Commission and the person to whom the opinion is issued. No declaratory opinion will be used as precedent for any other transaction or occurrence beyond that set of facts described in the original request.